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United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN HEGNESS, *Appellant,*
vs.
EUGENE CHILBERG, *Appellee.*

No. 2523

Brief for Appellant

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STATEMENT OF THE CASE.

The appellee, Eugene Chilberg, brought this suit against John Hegness, to have an accounting of the business of a partnership alleged to have been formed by a written agreement between the parties reading as follows:

"MEMORANDUM OF AGREEMENT, made and entered into this 25th day of August, 1909, by and between EUGENE CHILBERG of Nome, Alaska, party of the first part, and JOHN HEGNESS, also of Nome, Alaska, party of the second part, WITNESSETH:

THAT WHEREAS, the parties hereto are desirous

of securing mail contract to carry the United States mail between Nome, Alaska, and Unalakleek, Alaska, and are desirous of bidding upon Proposal Route No. 78136 and Proposal Route No. 78137, in the name of the party of the second part; and

WHEREAS, the parties are desirous of forming a co-partnership for the purpose of operating the said mail routes, or either of them, should the said contracts be obtained, and are desirous of evidencing the terms of their said copartnership in writing;

NOW, THEREFORE, for and in consideration of the mutual promises and other good considerations, it is agreed between the parties hereto as follows:

First. That each of the parties hereto shall endeavor so far as he can to obtain the said contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purposes and to obtain the bond required in the proposals for said mail routes, and if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the Government therefor, and to advance the necessary money to begin and operate the said mail route or routes under the said contract or contracts until the payments are made by the Government according to the contract or contracts.

Second. Party of the second part agrees to furnish his own dog team, sled and equipment and give his personal service as a carrier on said route or routes, and shall reside, when not on the mail route, in the Town of Nome, and give his personal attention and supervision to the fulfillment and carrying out of said contract or contracts, if the same is obtained in his name as bidder.

Third. That the party of the second part shall receive the same compensation for his personal services for his attention to the said work as the other carriers employed by this partnership, and shall receive in addition thereto fifteen per cent (15%) of the net profits derived or made from the said contract or contracts, after all other expenses are paid.

Fourth. That the party of the first part for his share shall receive eighty-five per cent (85%) of the net profits derived or made from the said contract or contracts after all expenses are paid for operating the same.

Fifth. That all warrants issued and delivered by the Government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part or his representative or agent, who shall keep a strict and accurate account of the same and

act as treasurer of the partnership.

In Witness Whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) Eugene Chilberg (Seal)

(Signed) John Hegness (Seal)

Signed, sealed and delivered in the presence of:

(Signed) William A. Gilmore,

(Signed) Mabel Searl."

The complaint, after setting forth the written contract as above, alleges in substance that after execution of the contract the plaintiff and defendant, in the name, however, of defendant, obtained the contract for carrying the mail between Unalakleet and Nome, Alaska, for a period of four years at a rate of $16,000.00 per year, to expire in the summer of 1914 (Tr. p. 4).

Chilberg, plaintiff in the court below, in his complaint alleges "that the said mail contract was secured from the United States Government for the plaintiff and defendant under the terms of said co-partnership agreement, *through the efforts of the plaintiff and without any aid or assistance from said defendant.*". (Tr. p. 4-5.)

After allegations that the defendant Hegness had and was threatening to retain more than his share of the money paid and to be paid by the

Government, plaintiff prayed for judgment as follows:

"Wherefore plaintiff prays for an order and decree of the court as follows:

First. That the court enter a temporary restraining order restraining and enjoining the said defendant from secreting or cashing any of the warrants hereafter received by him from the United States Government in payment of any mail services rendered between Unalakleek and Nome, Alaska, until the final hearing and determination of this action, and the court further order and direct the said defendant to deliver all of said warrants to the said Pacific Cold Storage Company, treasurer of said co-partnership.

Second. That the court compel the defendant to account to the plaintiff for all money and warrants received for said mail services during the term of said co-partnership agreement, and that the court render an accounting between plaintiff and defendant of all things embraced within the scope of said co-partnership and by its decree dissolve said co-partnership.

Third. That upon the final hearing and accounting in this case, the court render its decree and judgment in favor of the plaintiff and against the defendant for the amount due from said defendant

to the plaintiff.

Fourth. That the plaintiff do have and recover from the defendant his costs and disbursements in this action, and for such other and further relief as shall seem to the court meet and proper."

A temporary restraining order was issued (Tr. p. 12), and after hearings the court, on September 18, 1914, made and entered an injunction *pendente lite,* the ordering part of which is as follows:

"Now Orders and Directs that pending the final determination and decree or other order of this court, you, John Hegness, defendant, your attorneys and agents, be, and each of you are hereby enjoined from secreting, cashing, assigning or disposing of (except to the Pacific Cold Storage Co., Nome, Alaska) or taking, sending, or permitting to be sent without the District of Alaska, or the jurisdiction of this court, postal warrant No. 363,766, bearing date July 29th, 1914, for $3,903.02, this being a warrant received by you on account of the contract of August 9th, 1909, set forth in plaintiff's complaint, or any other postal warrants received or hereafter received by you on account of said contract of August 9th, 1909, in payment of any services on U. S. Mail Route No. 78136." (Tr. pp. 52-53.)

Afterwards, on September 26th, 1914, the court made and entered an order appointing a receiver,

the ordering part of which is as follows:

"Now, Therefore, It is by the court hereby ordered that a receiver be appointed and that G. A. Adams, clerk of the above-entitled court, be and he is hereby appointed receiver of said co-partnership with authority to demand, receive and hold, subject to the further and final order of the court, from plaintiff and defendant, all postal warrants received in payment of services rendered under contract of August 25th, 1909, U. S. Mail Route No. 78136, and particularly postal warrant No. 363,766, bearing date July 29th, 1914, for $3,903.02, issued in payment of services rendered under said contract, or any other warrants received thereunder, and the parties hereto are further ordered and directed to deliver all said warrants to said receiver immediately." (Tr. pp. 53-54.)

The defendant duly excepted to each of said orders (Tr. pp. 53 and 54). A bill of exceptions was duly settled containing all the evidence used on the hearings (Tr. p. 55), and defendant in due time perfected appeals to this court from said order of injunction *pendente lite* and appointing receiver (Tr. pp. 73 and 79).

The questions arising on both appeals are the same.

SPECIFICATIONS OF ERRORS.

The assignments of error upon the appeal from the order of injunction *pendente lite* are as follows:

I.

"The court erred in making and entering said injunction order, for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face.

3.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the statutes of the United States and void.

4.

The court erred in making and entering said injunction order in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and

regulations of the Postoffice Department of the United States, and against public policy and void.

5.

The court erred in making and entering said injunction order in this, that it appears from the allegations of plaintiff's complaint and the answer and affidavits filed that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control."

The assignments of error upon the appeal from the order appointing receiver are as follows:

1.

"The court erred in making and entering said order appointing a receiver for the reason that the complaint in this action does not state facts sufficient to constitute a cause of action.

2.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is void on its face.

3.

The court erred in making and entering said

order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the statutes of the United States and void.

4.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of the complaint that the contract upon which this suit is based is contrary to the laws and regulations of the Postoffice Department of the United States and against public policy and void.

5.

The court erred in making and entering said order appointing a receiver in this, that it appears from the allegations of plaintiff's complaint and the answer and affidavits filed herein that this suit was and is prematurely brought and was brought at a time when said defendant had no postoffice warrants whatever in his possession or under his control."

Argument.

I.

THE CONTRACT SUED ON IS AGAINST PUBLIC POLICY AND VOID UPON GENERAL PRINCIPLES OF LAW BECAUSE ITS TENDENCY IS TO PREVENT OR DIMINISH COMPETITION.

Greenhood, in his work on *Public Policy*, p. 178, says:

"Rule CLXXII. Any agreement which in its object or nature is calculated to diminish competition for the obtainment of a public or *quasi* public contract to the detriment of the public or those awarding the contract, is void."

The first illustration given by Greenhood under this general rule is exactly in point. It is thus stated by that author:

"A contract for making a certain public road is about to be let at auction to the lowest bidder. A and B agree that one of them only should bid for the contract, and, if it should be awarded to one, the other should have an equal share in it. The agreement is void."

Wilbur vs. How., 8 Johns (N. Y.), 444.

In determining whether the contract in the case at bar is void, for the reasons under discussion, it need not appear that the agreement really did produce any result detrimental to the public interest, but it is sufficient if the agreement tends directly or indirectly to restrain or lessen the rivalry and

competition between bidders.

Atcheson vs. Mallon, 43 N. Y. 147.

In the case just cited it appeared that the board of auditors of a New York town had according to law advertised for sealed bids for the collection of taxes which the law required to be awarded "to the person offering terms most favorable to the town." Plaintiff and defendant both bid, but agreed "that, if either obtained the award of the collection of taxes, both should share equally in the profits and be liable to an equal share of the losses." The contract was awarded to defendant, who performed it but refused to account to plaintiff, who sued for an accounting. The agreement was held void as against public policy, Folger, J., saying:

"It is not necessary, for the determination of the case, to inquire whether the effect of the agreement between the parties was in fact detrimental to the town of Oswegatchie. The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements which in their necessary operation upon the action of the parties to them, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public, or of third parties, are against the principles of sound public policy and are void (*Gulick vs. Bailey,* 5 Halst. 87; *Mills vs. Mills,* 40 N. Y. 545-6.)

The object of the act of 1866 is plain. It was to reduce to the taxpayers of the town of Oswegatchie the expense of the collection of taxes upon them, either directly, by securing the collection at

a lower rate of compensation therefor, or indirectly, by the payment into the town treasury of a bonus in money, for the privilege of serving as collector. The object and policy of the statute was to be achieved only by exciting the rivalry and competition of men seeking this privilege. This competition was to be excited by advertisement for sealed and secret proposals. Each bidder, ignorant of what his rival was about to offer, would be under a stimulus, to make a bid at the best rate to the town, which his judgment would sanction, as of profit to himself. Whatever made known to one bidder the views and proposals of another, abated his stimulus, and tended to weaken the rivalry and deaden competition. And when an agreement was made between bidders, to share in the acceptance of an offer to either, it is apparent that the competition must materially slacken. Each of the parties had intended making a proposal on his own account, and it was after each knew of the other's intention that the agreement between them was proposed and entered into. Until it can be truthfully said that men's actions will not be affected by a consideration of their self-interest, it cannot be maintained that the parties to this agreement were likely, after it was formed, to be as strong competitors as they were before. Such is the natural effect of agreements of this nature; and it is for this reason, and not on account of the actual results upon the public or upon third persons of particular contracts, that they are held void. It is because men, with these agreements in their hands, and relying upon them for their gain, do not act toward the public and third persons as they would without them; under the stimulus of competing opposition."

The case of *Hoffman vs. McMullen*, 83 Fed. 372, decided by this court, and afterwards affirmed by the Supreme Court of the United States (174 U. S.

639), is, in our opinion, directly in point. The facts in the case just cited were substantially as follows: The water committee representing the city of Portland having advertised for bids to construct a pipe line, the parties entered into an agreement by which the defendant Hoffman bid for the work in the name of Hoffman & Bates. The plaintiff, McMullen, with the knowledge and concurrence of the defendant, made a separate bid in the name of the San Francisco Bridge Company, a company controlled by him. This bid was some $49,000 higher than the bid of the defendant. The contract having been awarded to the defendant, a written agreement of partnership was entered into by the parties for the execution of the contract to be entered into by the defendant with the city.

This partnership agreement provided that Hoffman & Bates, as first parties, and John McMullen, as second party, should each pay one-half of the expense of executing the contract, and each receive one-half of the profits or bear one-half of the loss resulting therefrom. The contract was awarded on defendant's bid, and proved a profitable one, the profits thereunder being nearly $140,000.00. Hoffman refused to account to McMullen for any part of the profits, "upon the ground that the bids made by them tended, under the circumstances, to lessen

competition, and operated as a fraud upon the city, and could not be enforced in equity, and upon the further ground that McMullen wholly failed to comply with the contract between the parties, and refused to perform the conditions upon which the defendant's agreement, to share the earnings of the contract with the plaintiff, was made."

The court held the partnership agreement void, and denied plaintiff any relief. Hawley, J., stated the general principle as follows (83 Fed. 372, 376):

"A contract to prevent competition and bidding for public works is contrary to public policy and cannot be enforced. The rule is universal that agreements which, in their necessary operation upon the action of the parties, tend to restrain their natural rivalry and competition, and thus to result in the disadvantage of the public or third parties, are against the principle of sound public policy, and are void. *Gulick vs. Ward,* 10 N. J. Law, 87, 91; *Swan vs. Chorpenning,* 20 Cal. 182, 185; *Hannah vs. Fife,* 27 Mich. 172, 180; *Weld vs. Lancaster,* 56 Me. 453, 457; *Noyes vs. Day,* 14 Vt. 384; *Gibbs vs. Smith,* 115 Mass. 592; *Doolin vs. Ward,* 6 Johns 194; *Wilbur vs. How,* 8 Johns 444; *Thompson vs. Davies,* 13 Johns 112; *Kelly vs. Devlin,* 58 How. Prac. 487; *Atcheson vs. Mallon,* 43 N. Y. 147; *Hunter vs. Pfeiffer,* 108 Ind. 197, 200, 9 N. E. 124; *King vs. Winants,* 71 N. C. 469, 474; *Durfee vs. Moran,* 57 Mo. 374, 379; *Lawnin vs. Bradley,* 13 Mo. App. 361; *Engelman vs. Skrainka,* 14 Mo. App. 438; *Woodruff vs. Berry,* 40 Ark. 252, 267; *Hyer vs. Traction Co.,* 80 Fed. 839, 844."

Upon appeal to the Supreme Court of the United States, Mr. Justice Peckham, in delivering

the opinion of the court, condemns the contract as void in the most emphatic terms. Some extracts from his opinion are (174 U. S. 639, 19 Sup. Ct. Rep. 839, 842, 843):

"It is in truth utterly impossible to accurately or fully predict all the vicious results to be apprehended as the natural effect of this kind of an agreement. It cannot be said in all cases just what the actual effect may have been. * * *

It might readily be surmised that if these parties had bid in competition, one or both of the bids would have been lower than their combined bid. It was not necessary, however, to prove so difficult a fact. The inference would be natural. In *Richardson vs. Crandall,* 48 N. Y. 348, 362, the court said: 'In all cases where contracts are claimed to be void, as against public policy, it matters not that any particular contract is free from any taint of actual fraud, oppression or corruption. The law looks to the natural tendency of such contracts. The vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate,' citing *Atcheson vs. Mallon,* 43 N. Y. 147. * * *

Contracts of the nature of this one are illegal in their nature and tendency, and for that reason no inquiry is necessary as to the particular effect of any one contract, because it would not alter the general nature of the contracts of this description, or the force of the public policy which condemns them."

The case of *Hunter vs. Pfeiffer,* 9 N. E. 124 (Ind.), is exactly on all fours with the case at bar. The facts are thus stated in the opinion of the court:

"On the fifth day of February, 1885, Hunter,

Pfeiffer and two others entered into an agreement to form a partnership, the purpose of which was to secure the contract for building a free gravel road, the construction of which, we may infer from the complaint, had been duly determined upon by the Board of Commissioners of Warren County. The arrangement was that Pfeiffer should attend the letting, which had been advertised, and bid for the work, and secure the contract, and that Hunter, and his associates, should become sureties on the bond required by law in that behalf to be given by the contractor. Pfeiffer bid off the work, and was awarded the contract at the price of $13,465. The contract for the work was duly executed by the Board to Pfeiffer. Hunter and the other two signed his bond according to the agreement. The plaintiff avers that the contract between Pfeiffer and the Board is worth $3,000; that $10,000 is more than sufficient to execute the work according to the agreement. It was further averred that, but for the alleged agreement of partnership, the plaintiff would have bid for and received the contract, and would have made $1,000 profit thereon. The plaintiff alleges that after the contract was secured, and the bond signed, Pfeiffer and the other two defendants wholly refused to permit him to participate in the prosecution of the work, and excluded him from the partnership which had been agreed upon; that the defendants were proceeding with the work, had already made $1,000 in profits; and that, when completed, the contract would yield a net profit of $3,000. He demanded judgment for $1,000.

On motion of the defendant below, the court struck out that part of the complaint which avers that, but for the alleged agreement of partnership between the parties to the suit, the plaintiff would have bid for and received the contract for the construction of the work proposed and would have made a profit of $1,000 thereon. The appellant complains of this, and insists that the ruling on the demurrer

to his complaint should be considered here as though the rejected averment remained in."

The opinion of the Supreme Court of Indiana upon the facts just stated is as follows:

"Apart from the averment eliminated, there can be little question of the invalidity of the complaint. With that part considered as in, it is bad beyond any doubt whatever. Without the averment in question, it is fairly inferable from the complaint that the agreement to form a partnership was nothing more nor less than a thinly disguised scheme to stifle or diminish competition for the obtainment of a contract to construct a public work. With the averment in, the real purpose of the partnership is not left to inference; the averment being boldly made that but for the agreement the plaintiff would have bid for and received the contract for the work at a price at which he would have derived a profit of $1,000. In effect, this is to say that the appellant and appellees were about to bid for the construction of a public work which was to be let in pursuance of law, and that the appellant was induced to withhold a lower bid than that which the appellee proposed to make, in consideration that he should be taken into partnership, and be permitted to share in the profits of a contract which appellee Pfeiffer was thus to secure. Upon all such partnerships the law sets the seal of its condemnation. Persons who combine in schemes of the character disclosed can secure no aid from the courts in coercing a division of profits anticipated or accrued.

The statute under which free gravel or turnpike roads are constructed, requires contracts for their construction to be let to the lowest and best bidder, and that all bids shall be sealed when filed. If the courts should lend any countenance to such a contract for partnership as that disclosed in the complaint in either aspect in which it is presented,

the effect would be to afford facilities for bidders to enter into secret agreements and combinations with each other and thus enable them to defeat the plain purpose of the legislature in requiring such contracts to be let to the lowest and best bidder. The whole purpose of the statute is to encourage open, fair competition between reasonable bidders, and any secret combination—call it partnership or anything else—the effect of which is to abate honest rivalry, or prevent fair competition, is to be condemned as in violation of public policy, and void. No one can predicate an enforceable right upon such an agreement. *Atcheson vs. Malbon,* 43 N. Y. 147; *Woodworth vs. Bennett,* Id. 273; *Gibbs vs. Smith,* 115 Mass. 592; *Hannah vs. Fife,* 27 Mich. 172; *Greenhood, Public Pol.,* 178, 179 and notes.

The partnership contemplated by this agreement was a secret arrangement, unknown to the officers, who had the public interest under their protection. It was intended that the officers should believe they were contracting with Pfeiffer alone, while he and those who were accepted as sureties on his bond intended among themselves a secret partnership wholly unknown to the Board of Commissioners. No lawful contract of partnership resulted from such a combination. *Lewis vs. Armstrong,* 3 Mylne & K. 45. Persons who engage in forming partnerships of the character disclosed must rely for a division of the resulting profits upon those sentiments of honor which are supposed to prevail among all who form combinations which are condemned by the policy of the law.

The purpose, tendency and necessary effect of such a contract was to stifle fair, open, actual competition, and to perpetrate a fraud upon the public officers. If, in letting a contract such as this, parties, without knowledge of the bids of each other, submit their bids as the law requires, and afterwards enter into a partnership for the construction of the work, with the knowledge of the officers letting the same,

a question of a different character is presented. Such a transaction bears some similitude to the contract which was upheld in *Breslin vs. Brown,* 24 Ohio St. 565, a case which, on account of the liberal view taken of the contract there involved, is not universally endorsed. That case, however, affords no aid to the appellant here."

It would be impossible to find a case where the facts were any more similar to the case at bar. Chilberg and Hegness agreed that the bid should be put in in the name of Hegness, which was in fact done and the contract was awarded to Hegness. Chilberg was to furnish the bond. It was to be concealed from the officials of the Post Office Department that Chilberg was in any way interested in the bid. And in fact it was so concealed. It is provided by the regulations of the Post Office Department that "Proposals for carrying mails shall be made on forms prescribed by the Postmaster General."

Postal Laws and Regulations, Ed. of 1913, Sec. 1414, p. 642.

The forms prescribed by the Postmaster General and which must be used contain the following statement to which the bidder must certify:

"This proposal is made in my own interest, and not by me as the agent of another person or company; with full knowledge of the distance of the route, the weight of the mail to be carried, and all other particulars with reference to the route and

service; and, also, after careful examination of the instructions attached to said advertisement."

It is seen that the parties not only concealed from the officials of the Post Office Department that Chilberg was the party principally interested in the bid, but actually stated and certified that the bid was put in solely in the interest of Hegness.

There is nothing in the law which would prevent Chilberg and Hegness from forming a partnership and openly putting in a joint bid.

As was said in *Atcheson vs. Mallon,* 43 N. Y. 147, 151:

"A joint proposal, the result of honest co-operation, though it might prevent the rivalry of the parties and thus lessen competition, is not an act forbidden by public policy. Joint adventures are allowed. The risk as well as the profit is joint, and openly assumed. The public may obtain at least the benefit of the joint responsibility and the joint ability to do the service. The public agents know all there is in the transaction and can more justly estimate the motives of the bidders and weigh the merits of the bid."

The above quotation from *Atcheson vs. Mallon, Supra,* is quoted with approval by the Supreme Court of the United States in *McMullen vs. Hoffman,* 174 U. S. 639, 19 Sup. Ct. Rep. 839, 844, and Mr. Justice Peckham says, of the contract held void in *McMullen vs. Hoffman:*

"We have here nothing to do with the combina-

tion of interest which is open and avowed, which appears on the face of the bid, and which is therefore known to all. Such a combination is frequently proper if not essential; and where no concealment is practiced, and the fact is known, there may be no ground whatever for judging it to be in any manner improper."

This distinction disposes of most of the authorities which at first glance might seem to support the position of the appellee.

In *Page on Contracts*, Vol. 1, p. 629, the rule is thus stated:

"Contracts to stifle bidding partake of the nature of contracts to defraud a third person.

Contracts between two or more prospective competitors to prevent competition in bids for letting public contracts are invalid.

Where the parties agree to let one party bid, the profits to be dividend among them all, no action can be maintained for the recovery of such profits."

In *Cyc.*, Vol. 9, at p. 491, among contracts stated to be void, as against public policy, we find enumerated:

"Agreements not to compete with another in making bids, to withdraw a bid for a public or a *quasi* public contract, *to share in the result or profits*, or other agreement having a direct tendency to prevent bidding or competition."

Other authorities not already cited, condemning as against public policy and void contracts similar in principle to the one at bar, are:

Hyer vs. Richmond Traction Co., 168 U. S. 471, 18 Sup. Ct. Rep. 114.

Woodworth vs. Bennett, 43 N. Y. 273.

Ray vs. Mackin, 100 Ill. 246.

Daily vs. Hollis, 66 S. W. (Tex. Civ. App.) 586.
McClelland vs. Citizens' Bank, 82 N. W. (Neb.) 319.
Whalen vs. Harrison, 26 Mont. 316, 67 Pac. 934.
Citizens' Nat. Bank vs. Mitchell, 103 Pac. (Okla.) 720.

The opinion of the court below in the case at bar is printed in full in the transcript (Tr. pp. 56-70). The learned judge of the trial court, while endorsing the doctrine of *McMullen vs. Hoffman, Supra,* condemning contracts that tend to lessen competition, and suggest a fraudulent combination of interests and concealment by the parties to it, says that he "fails to discover on the face of the contract alleged in the complaint here any such suggestion that would bring this contract within" the rule of *McMullen vs. Hoffman* and other cases cited (Tr. p. 63). In this we contend the trial court fell into error. The trial court bases its decision upon the following authorities: *Hobbs vs. McLean,* 117 U. S. 567; *Northern Pacific Lumber Co. vs. Spore,* 75 Pac. Rep. 890; *Dulaney vs. Scudder,* 94 Fed. 6; *Bellows vs. Russell,* 51 Am. Dec. 238, and *Breslin vs. Brown,* 24 Ohio St. 565.

In *Hobbs vs. McLean, Supra,* no question of public policy is involved or discussed. It does not appear from the statement of the case that the

parties to the contract involved had made any agreement as to putting in the bid or bids for the Government contract. On the contrary, it is fairly to be inferred from the statement that the bid had already been put in when the partnership contract was made. All through the opinion of the court in *Hobbs vs. McLean, Supra,* it is assumed that the partnership contract there involved was valid unless it fell within the inhibition of Sections 3437 and 3737, Revised Statutes of the United States. We will come to a discussion of these sections of the law later, but our present argument is directed to the point that the contract sued on in the case at bar is void as against public policy without reference to any statutory law whatever. The distinction between the cases is that is *Hobbs vs. McLean,* a partnership was formed to carry out a contract with the Government, while in the case at bar the partnership was formed for the purpose of bidding upon and obtaining the contract from the Government, and contemplated doing so secretly in the name of one partner only.

The case of *Northern Pacific Lumber Co. vs. Spore,* 75 Pac. 890, is not at all in point. In that case it appears that the contract with the Government was already entered into before any agreement was made whatever by the parties alleged to be partners. *Dulaney vs. Scudder,* 94 Fed. 6, is the

case of an assignment of a Government contract to construct a levee. There is no mention or suggestion in the opinion that there was any collusion about the bidding or that any contractual relations whatever existed between the parties until after the contract was obtained from the Government. In this case, the whole controversy turned on the construction of Rev. Stat., Secs. 3477 and 3737.

The case of *Breslin vs. Brown,* 24 Ohio St. 565, 15 Am. Rep. 627, if it be considered in point, can not be considered as authority. *Greenhood on Public Policy,* p. 181, thus states the case of *Breslin vs. Brown:*

"A Government contract for making public improvements is about to be let to the lowest and best bidder. A files his bid for the work. A then enters into an agreement with B, who is about to file his bid for the same work, to become partners in doing the work in the event that the contract should be awarded to either of them. B then files his bid, and A is awarded the contract. He must permit B to become a partner in the work."

Greenhood criticizes the case, saying "We do not endorse this decision." (*Greenhood on Public Policy,* p. 182, note 1.) *Breslin vs. Brown, Supra,* is also criticised by the Supreme Court of Indiana in *Hunter vs. Pfeiffer,* 9 N. E. 124, 127, the court describing the Ohio case as one "which on account of the liberal view taken by the contract there involved is not universally endorsed." Furthermore,

the case of *Breslin vs. Brown, Supra,* cannot be reconciled with the case of *Atcheson vs. Mallon,* 43 N. Y. 147. The Supreme Court of Ohio, in rendering their opinion in *Breslin vs. Brown,* severely criticise the case of *Atcheson vs. Mallon,* and refuse to follow it, saying (15 Am. Rep. 632): "Our attention has been called to a decision of the Court of Appeals of New York (*Atcheson vs. Mallon,* 43 N. Y. 147, 3 Am. Rep. 678) which follows an earlier case in the same state wherein a different conclusion was reached. Much as we esteem the decisions of that court, we cannot follow it to the full extent to which it has applied this rule of public policy."

But the Supreme Court of the United States in *McMullen vs. Hoffman*, 174 U. S. 639, 19 Sup. Ct. Rep. 839, 844, approve, quote from and follow the said case of *Atcheson vs. Mallon.* Also in the case of *Hyer vs. Richmond Traction Co.,* 168 U. S. 471, 18 Sup. Ct. Rep. 114, 117, *Atcheson vs. Mallon* is cited, approved, quoted from and followed upon the very point in question here.

Under these circumstances, even if it be considered in point, *Breslin vs. Brown* cannot be considered as authority.

In the case of *Bellows vs. Russell*, 20 N. H. 427, 51 Am. Dec. 238, it seems that several parties having

ascertained that each intended to bid on a certain mail contract, met together and entered into a contract to make a joint bid. It was held that the contract was not necessarily void. This decision cannot be considered as authority because it is in direct conflict with the decision of this court in the case of *Hoffman vs. McMullen,* 83 Fed. 372, and *McMullen vs. Hoffman,* 174 U. S. 639, as well as many other authorities hereinbefore cited.

Mr. Justice Peckham in *McMullen vs. Hoffman, Supra,* says (19 Sup. Ct. Rep. 844):

"It is not too much to say that the most perfect good faith is called for on the part of bidders at these public lettings, so far as concerns their position relating to the bids put in by them or in their interest."

Can it be said in the case at bar that Chilberg, who was to have eighty-five per cent of the profits of the contract, acted in "perfect good faith" in causing a bid to be made in the name of Hegness and causing Hegness to deceive the officials of the Post Office Department by certifying that the bid was made "in my own interest and not as the agent of another person or company"?

II.

The Contract Sued On Is Void Because It Is an Agreement for Compensation to Secure a Government Contract and Contemplates the Use of Secret and Unlawful Influence With the Officers of the Post Office Department.

It is rare that parties seeking to accomplish an

unlawful purpose are as frank in reducing their contract to writing as in the case at bar. After reciting that the parties form a partnership to bid upon and obtain the mail contract or contracts, in the name of the second party, Hegness, the contract provides (Tr. pp. 2 and 3):

"First, that each of the parties hereto shall endeavor so far as he can to obtain the said contract or contracts above mentioned, or either of them, and to that end the party of the first part agrees to advance all necessary funds needed for such purpose, and to obtain the bonds required in the proposals for said mail routes, and if either or both of said contracts are secured, party of the first part agrees to furnish the necessary bond required by the Government therefor, and to advance the necessary money to begin and operate said mail route or routes under the said contract or contracts until the payments are made by the Government according to the contract or contracts."

Bearing in mind that the Government furnishes the blank forms for the bids which must be used, and that all that a qualified bidder can lawfully do to obtain a contract is to submit a valid bid and bond, what does the contract mean when it says that Chilberg is to "endeavor so far as he ca nto obtain the said contracts or either of them, and to that end" also "to advance all necessary funds needed for such purpose"?

In what lawful way could Chilberg spend the money in obtaining the contract?

Why was Chilberg to have nearly a six-sevenths interest in the contract? If not to stifle competition, it must have been to reimburse him for the money he was to expend in obtaining the contract and to compensate him for his influence with the Department.

It would seem almost unnecessary to argue as to the validity of a secret agreement whereby one party was to receive eighty-five per cent of the profits of a Government contract in return for his agreeing, among other things, "to endeavor so far as he can to obtain the said contract," and further agreeing "to advance all necessary funds needed for such purpose." If it should in any manner be considered uncertain that the contract contemplates the use of unlawful means on the part of Chilberg to obtain the contract the allegations of plaintiff's complaint remove all uncertainty. The plaintiff Chilberg specifically alleges in his complaint that although defendant Hegness was the bidder, that the mail contract was really secured *"through the efforts of plaintiff and without any aid or assistance from defendant."* (Tr. pp. 4-5.)

The precise question came before the Supreme Court of the United States in the case of *Providence Tool Company vs. Norris,* reported in 2 Wall. 45.

In that case it appeared that the Providence

Tool Company, a corporation, "entered into a contract with the Government through the Secretary of War, to deliver to officers of the United States within certain stated periods, twenty-five thousand muskets of a specified pattern at the rate of $20 a musket. This contract was procured through the exertions of Norris, the plaintiff in the court below, upon a previous agreement with the corporation through its managing agent, that in case he obtained a contract of this kind he should receive compensation for his services proportionate to the extent of the contract. Soon afterwards a dispute arose between the parties as to the amount of compensation to be paid."

After negotiations for a settlement failed, Norris brought suit. The defense was interposed that "An agreement for compensation to procure a contract from the Government to furnish its supplies is against public policy and void."

Mr. Justice Field, in delivering the opinion of the court, said:

"The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish its supplies, be enforced by the courts? We have no hesitation in answering the question in the negative. All contracts for supplies should be made with those, and with those only, who will execute them most faithfully and at the least expense to the Government. Consideration

as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the Government. No other consideration can lawfully enter into the transaction, so far as the Government is concerned. Such is the rule of public policy; and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts; and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds.

We have not met with any adjudication upon an agreement precisely similar, but the principle which determines its invalidity has been asserted in a great variety of cases. It has been asserted in cases relating to agreements for compensation for procuring legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements. Legislation should be prompted solely from considerations of the public good, and the best means of advancing it. Whatever tends to divert the attention of legislators from their high duties, to mislead their judgments, or to substitute other motives for their conduct than the advancement of the public interests, must necessarily and directly tend to impair the integrity of our political institutions. Agreements for compensation, contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.

There is no real difference in principle between agreements to procure favors from legislative bodies and agreements to procure favors in the shape of contracts from the heads of departments.

The introduction of elements to control the actions of both is the direct and inevitable result of all such arrangements. *Marshall vs. Balt. & O. R. R. Co.,* 16 How. 314; *Harris vs. Roof,* 10 Barb. 489; *Fuller vs. Dame,* 18 Pick 472."

The case of *Providence Tool Company vs. Norris, Supra,* has recently been followed and approved in the case of *Hazelton vs. Sheckels,* 202 U. S. 71, 26 Sup. Ct. Rep. 567. The point of this case is thus stated in the syllabus:

"An agreement to sell a tract of land at a specified price if the offer should be accepted within the time mentioned is unenforceable as contrary to public policy where made in part consideration of services rendered before and after the making of the agreement in bringing the property to the attention of committees of Congress as a suitable and appropriate site for a hall of records, although the actual services rendered may have been legitimate."

Mr. Justice Holmes, in delivering the opinion of the court, said:

"Every part of the consideration goes equally to the whole promise, and therefore if any part of it is contrary to public policy, the whole promise fails." Citing: *Pickering vs. Ilfracombe R. Co.,* L. R. 3. C. P. 235, 250; *Harrington vs. Victoria Graving Dock Co.,* L. R. 3 Q. B. Div. 549; *Woodruff vs. Hinman,* 11 Vt. 592, 34 Am. Dec. 712; *Clark vs. Ricker,* 14 N. H. 44; *McMullen vs. Hoffman,* 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; *Bishop vs. Palmer,* 146 Mass. 469, 474, 4 Am. St. Rep. 339, 16 N. E. 299.

And upon the validity of the consideration which was alleged in the bill, to have been in part

"services rendered both before and after the making of said contract, by the plaintiff in bringing the property to the attention of the committees of Congress as a suitable and appropriate site for a hall of records," Mr. Justice Holmes said:

"The promise to convey did not become binding until the services were rendered, and, when rendered, according to the allegations of the bill, they were legitimate. We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and, whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The court will not inquire what was done. If that should be improper, it probably would be hidden and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. *Marshall vs. Baltimore & O. R. R. Co.*, 16 How. 314, 335, 336.

The general principle was laid down broadly in *Providence Tool Co. vs. Norris,* 2 Wall. 45, 54, that an agreement for compensation to procure a contract from the Government to furnish its supplies could not be enforced, irrespective of the question whether improper means were contemplated or used for procuring it. *McMullen vs. Hoffman,* 174 U. S. 639, 648."

The case at bar cannot be distinguished from *Providence Tool Co. vs. Norris, Supra.* In that case, to use the language of the Supreme Court, "*the*

contract was procured through the exertions of Norris, the plaintiff in the court below," while in the case at bar, to use the language of the plaintiff, Chilberg, in his complaint, the contract was obtained *"through the efforts of the plaintiff and without any aid or assistance from said defendant."*

Revised Statutes, Sec. 3949, provides that "All contracts for carrying the mail shall be in the name of the United States and shall be awarded to the lowest bidder * * *."

Such being the case, what lawful influence could Chilberg have exercised which could have been the *sole* cause of the contract having been awarded to Hegness, and in return for which Chilberg was to receive eighty-five per cent of the profits of the contract? The conclusion is inevitable that such effort and influence on the part of Chilberg must have been something which both law and public policy condemn.

Providence Tool Co. vs. Norris, Supra, has also been cited and quoted from by this court in *Washington Irrigation Co. vs. Krutz*, 119 Fed. 279, 286, where, in speaking of a contract similar in principle to the one at bar, Hawley, *J.*, said:

"It is the duty of courts to carefully scrutinize contracts of this general character, and to condemn the very appearance of evil, as the tendency of such contracts is to lead to the encouragement of wrong-

doing. Hence the relief asked for in such cases should not be granted. This result follows 'without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country.' *Tool Co. vs. Norris*, 2 Wall. 45, 56; *Trist vs. Child*, 21 Wall. 441, 452; *Meguire vs. Corwine*, 101 U. S. 108, 111; *Oscanyan vs. Arms Co.*, 103 U. S. 261, 275."

In *Weed vs. Black*, 2 McArthur 268, 29 Am. Rep. 618, the court said of such a contract as we are considering:

"If the terms of the contract be broad enough to cover services of any kind, whether secret or open, honest or dishonest, the law pronounces a ban upon the paper itself."

Additional authorities to the same effect are:

Woodstock Iron Co. vs. Richmond, etc. Co., 129 U. S. 643, 658, 661.
Sussman vs. Porter, 137 Fed. 161.
Sheppy vs. Stevens, 177 Fed. 491.
Bestor vs. Wathren, 60 Ill. 138.
Crichfield vs. Bermudez Asphalt Pav. Co., 174 Ill. 466, 51 N. E. 552, 556.
Richardson vs. Crandall, 48 N. Y. 348, 362.
Veazy vs. Allen, 173 N. Y. 359, 371, 66 N. E. 103, 106.
Gill vs. Williams, 12 La. Ann. 219, 68 Am. Dec. 767.
Clippinger vs. Hepbaugh, 5 Watts & S. 315, 40 Am. Rep. 618.
Spalding vs. Ewing, 24 N. E. (Pa.) 219, 220.
Houlton vs. Dunn, 60 Minn. 26, 61 N. W. 898, 30 L. R. A. 737, 51 Am. St. Rep. 493.

Coquillard's Adm'r. vs. Bearss, 21 Ind. 482, 83 Am. Dec. 362.
Foltz vs. Cogswell, 86 Cal. 542, 25 Pac. 60.

III.

The Contract Sued On Is Void Under and By Virtue of the Provisions of Section 3963 of the Revised Statutes of the United States.

Section 3963 of the Revised Statutes of the United States reads as follows:

"No contractor for transporting the mails within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

This section is not mentioned in the opinion of the court below and is very different in its language and legal effect from Sections 3477 and 3737, Revised Statutes of the United States, which the court below considered in its opinion.

Section 3737 refers to all contracts with the United States, while Section 3963 refers to contracts for transporting the mails only. Said Section 3737 reads as follows:

"No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract, by the contracting parties, are reserved to the United States."

Section 3737 has been construed, both by the Supreme Court and the Circuit Court of Appeals, to be only for the protection of the Government, and it does not make an assignment of a Government contract void as between the transferror and transferee.

Burck vs. Taylor, 152 U. S. 634, 14 Sup. Ct. 696.
Dulaney vs. Scudder, 94 Fed. 6, 10.

In *Dulaney vs. Scudder* it was pointed out by the Circuit Court of Appeals for the Fifth Circuit, that by Section 3737 transfers are not "declared null and void" but that the statute causes the "annulment of the contract * * * so transferred so far as the United States are concerned." The court then quotes from *Burck vs. Taylor,* 152 U. S. 634, 14 Sup. Ct. 696, commenting on Section 3737 as follows:

"The express declaration that, so far as the United States are concerned, a transfer shall work an annulment of the contract, carries, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute. The government, in effect, by this section, said to every contractor, 'You may deal with your contract as you please, and as you may deal with any other property belonging to you, but, so far as we are concerned,

you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.' "

Section 3963 of the Revised Statutes, however, by express language, does make all assignments or transfers of contracts for transportation of the mails *"null and void,"* and under the reasoning of the two decisions last quoted, all such assignments and transfers must be held null and void for all purposes.

Apt authority for this contention is not wanting.

Nix vs. Bell, 66 Ga. 664.

This case is on all fours with the case at bar and is thus stated:

"Nix brought suit against Bell, alleging in brief as follows:

On the 1st day of July, 1876, Bell being accepted contractor of the Post Office Department for carrying the mails of the United States from Cleveland, in White County, to Gainesville, in Hall County, it was contracted and agreed between the parties that if Nix would furnish one horse and do the driving, and pay half the expenses at Gainesville, and half the tolls for crossing the Chattahoochee river, that Bell would furnish one horse and the vehicle, and pay the other half of the expenses, etc., and then the 'parties are to divide equally and to receive equally all the moneys received from the United States Government, and all moneys received from passengers and on freight or baggage,' etc. The amount received from the United States and also the amount received from passengers, etc., was

set forth, but is not material to the point made. It was also alleged that the plaintiff discharged his part of the contract, and did the service until October 28th, 1877, when he was ousted by the defendant. The defendant received all the moneys from the United States and from passengers, etc., and refused to pay the plaintiff any part thereof. It was alleged that this contract was made in parol, but was afterwards reduced to writing.

Defendant demurred to the declaration, the demurrer was sustained and plaintiff excepted."

Upon this state of facts, the Supreme Court of Georgia delivered the following opinion:

"We cannot see that the court below erred in the point decided. The contract, which is sought to be enforced, appears to be illegal under the laws of the United States and the post office regulations made under those laws.

See Revised Statutes, U. S., 3737, 3709, 3963; Post Office Reg., 1877, p. 146; Adver. for contr., P. M. Gen'l., of 1876, p. 51.

The contract on which the suit depends being illegal, no court can enforce it.

Judgment affirmed."

The use of the words "all such assignments or transfers shall be null and void" in Section 3963, means that such assignments shall be null and void for all purposes.

Spofford vs. Kirk, 97 U. S. 484, 488, 490.
National Bank of Commerce vs. Downie, 218 U. S. 345, 31 Sup. Ct. Rep. 89.

In *Spofford vs. Kirk,* just cited, the Supreme Court said of an assignment of a claim against the United States made null and void by Section 3477

of the Revised Statutes:

"We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government."

That the contract sued on in the case at bar constitutes an assignment of the contract with the Government can not be questioned. By virtue of the contract, Chilberg, the plaintiff below, claims now to be the owner of eighty-five per cent of said contract which was executed by the Government to Hegness. No particular form of words is necessary to constitute a valid assignment. Any act showing the intention of the parties to accomplish this purpose is sufficient.

Macklin vs. Kinealy, 41 S. W. (Mo.), 893, 895.
2 *Am. & Eng. Ency. of Law* (2nd Ed.), 1055.

To show the general policy of the Government to make all contracts for carrying the mail unassignable, reference may be had also to Section 1422 of the postal regulations, which provides, among other things, that "no transfer or assignment shall be made of a bid or any interest therein."

Postal Laws and Regulations (Ed. of 1913),

p. 644.

IV.

The Contract Sued On Is Void Under the Provisions of Section 3477, Revised Statutes of the United States, Prohibiting Assignments and Transfers of Any Claim Upon the United States, or Any Part or Share Thereof or Any Interest Therein.

This section reads as follows:

"All transfers or assignments of any claim made upon the United States, or any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

This section has been before the Supreme Court of the United States many times, and has been declared to render void every form of voluntary

assignment, both legal and equitable.

Spofford vs. Kirk, 97 U. S. 484, 24 L. ed. 1032.

United States vs. Gillis, 95 U. S. 407, 24 L. ed. 503.

Erwin vs. United States, 97 U. S. 392, 24 L. ed. 1065.

Goodman vs. Niblack, 102 U. S. 556, 26 L. ed. 229.

Ball vs. Halsell, 161 U. S. 72, 40 L. ed. 622, 16 Sup. Ct. Rep. 554.

St. Paul & D. R. Co. vs. United States, 112 U. S. 733, 28 L. ed. 861, 5 Sup. Ct. Rep. 366.

In *National Bank vs. Downie,* 218 U. S. 345, 31 Sup. Ct. Rep. 89, Mr. Justice Harlan said:

"The intention of Congress must be discovered in the act itself. * * * We cannot say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of any claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void, that they are valid and effective as between the parties thereto, and only invalid when set up against the Government."

In view of this language the only question to consider is whether the agreement sued on in the case at bar constitutes an assignment of or an agreement to assign a claim against the United States. That it does, we think plain. The agreement purports to make Chilberg the owner of an eighty-five per cent interest in the mail contract itself, and then specifically provides "that all warrants issued and

delivered by the Government in payment under the said contract or contracts shall be signed by the party of the second part and delivered to the party of the first part." (Tr. p. 4.)

The case of *Hobbs vs. McLean*, 117 U. S. 567, 6 Sup. Ct. Rep. 870, is relied upon by appellee but is not in point. The court there held that the formation of a partnership to carry into execution a government contract did not violate Section 3477 Revised Statutes. In the case of *Hobbs vs. McLean*, the contract between the parties was that they would form a partnership to perform a contract with the United States and would divide the profits after the money was collected from the Government. The suit was not brought until after the money was collected in full from the Government. In the case at bar the contract was formed for the purpose of obtaining the contract from the Government in the name of Hegness, and the effect of the contract was to transfer eighty-five per cent interest therein to Chilberg. And it contains a distinct and positive agreement on the part of Hegness to transfer all of the warrants, when he obtains them, to, Chilberg. An agreement to do something which the law forbids is just as void and illegal as the act itself.

In *Hobbs vs. McLean, Supra,* it was distinctly held that the action could not be maintained until

the money was actually paid over by the Government and received by the contractor. The court says, on this point:

"This suit is for the recovery, as assets of a partnership, of the money collected on the contract between Peck and the United States and its distribution among the partners on a settlement of the partnership affairs. If Peck had lived and had not been adjudicated bankrupt, the plaintiffs could not have maintained this suit against him until the money which is the subject of this controversy had been collected from the United States. They had no right under this contract with Peck to demand their share of the money until the money had come to his hands. The bankruptcy and death of Peck did not change the terms of the contract. They could not sue his assignee for a distribution of the fund until the fund had been received."

In the case at bar, the warrant which the court ordered turned over to the receiver was issued July 29th, 1914 (Tr. p. 31), while the suit was commenced July 3rd, 1914 (Tr. p. 9).

In conclusion, we may say that the question whether the contract sued on violates Section 3477 of the Revised Statutes is entirely independent of the proposition that it violates and is void under Section 3963 thereof, and both of said propositions are independent of the reasons why said contract should be held void set forth in the first two subdivisions of our argument. As the contract on which the suit is founded is void, it follows that no action

or suit whatever can be founded on it.

McMullen vs. Hoffman, 174 U. S. 639, 19 Sup. Ct. Rep. 839, 845, and cases cited.

Although these appeals are taken from interlocutory orders, nevertheless as the contract sued on is void, and cannot sustain plaintiff's claim under any circumstances, the court should, in reversing said orders, direct the court below to dismiss the action on the merits.

Tornanses vs. Melsing, 109 Fed. 710.

Respectfully submitted,

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